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Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 37.3.

STATEMENT OF THE CASE

Under § 11343 of the Interstate Commerce Act ("ICA"), mergers, consolidations, and other acquisitions of control involving two or more rail carriers (hereinafter generally referred to as "consolidations") "may be carried out only with the approval and authorization of

the" Interstate Commerce Commission ("ICC" or "Commission"). 49 U.S.C. § 11343. Under § 11344, when considering such a proposed transaction, the ICC must balance a number of factors, including "the interest of carrier employees affected by the proposed transaction," and "shall approve and authorize" the transaction if "consistent with the public interest." 49 U.S.C. § 11344. And, under § 11347, the ICC in approving such a transaction "shall require" a rail carrier involved in the transaction "to provide a fair arrangement . . . protective of the interests of employees" as is discussed more fully below. 49 U.S.C. § 11347. Section 11341(a) provides that the ICC's "authority" under those provisions "is exclusive," and that each participant in an approved transaction "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . ." 49 U.S.C. § 11341(a).

The basic issue in these cases is whether that exemption from "all other law" applies to provisions of collective bargaining agreements, otherwise enforceable under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, that if enforced would impede the "carrying out" of an approved transaction. That issue arises out of applications of employee protection arrangements, imposed by the ICC upon petitioners under § 11347 of the ICA in approving acquisitions of control over the components of what are now the CSX and the Norfolk Southern rail systems.

In each case, the ICC imposed the so-called *New York Dock* employee protections that it normally imposes in approving consolidations.[1] In general, an employee adversely affected by implementation of the transaction is assured of compensation comparable to that received

[1] See *New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

prior thereto for up to six years thereafter, indexed in accordance with general wage increases. An employee required to move is reimbursed for moving expenses and for loss incurred in the sale of home or cancellation of a lease. See 360 I.C.C. at 84-90. The carrier's *quid pro quo* is that it may rearrange work and employee forces, pursuant to an implementing agreement or arbitration award under Art. I, § 4, even if that would not be permissible under collective bargaining agreements. The carrier must give advance notice of a contemplated implementation that "may cause the dismissal or displacement of any employees, or rearrangement of forces . . ."; the carrier and employee representatives negotiate upon an implementing agreement that "shall provide for the selection of forces from all employees involved on a basis . . . appropriate for application in the particular case . . ."; and, if no agreement is reached, either may submit the matter to arbitration. The contemplated change in "operations, services, facilities, or equipment" cannot take place until after such implementing agreement or arbitration award is had, and "any assignment of employees made necessary" as a result "shall be made on the basis" provided therein. See 360 I.C.C. at 85.

In these cases, the ICC upheld (with some revision in one case) arbitration awards under Art. I, § 4, of *New York Dock*.[2] The ICC concluded that the proposed implementations were a carrying out of the transactions it approved; and that such implementations appropriately may include both transfers of work and transfers of employees even if inconsistent with a collective bargaining agreement or the RLA. See *CSX Corp.—Control—*

[2] The ICC has exclusive jurisdiction to review arbitration awards under employee protection arrangements it imposes. See, *e.g.*, *Brotherhood Ry. Carmen* v. *CSX Transp., Inc.*, 855 F.2d 745, 748-749 (11th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3543 (1989); *International Broth. of Elec. Workers* v. *I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988); *United Transp. Union* v. *Norfolk and Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

Chessie and Seaboard C.L.I., 4 I.C.C.2d 641, 648-650 (1988). As stated by the Commission in its unpublished opinion regarding the Norfolk Southern coordination:

> ". . . [T]here can be no assurance that post-consummation coordinations contemplated as part of the transaction [approved by the ICC] could ever be accomplished if RLA dispute resolution mechanisms were followed. Thus, the [arbitration] panel correctly found . . . that terms of the Commission's order, and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based upon existing collective bargaining agreements. . . . Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a) [of the ICA]. . . . The proposed transfer . . . is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved." Pet. in No. 89-1027 at 35a (citations omitted).

The Court of Appeals reversed because, in its view, § 11341(a) of the ICA "does not grant the ICC its claimed power to override provisions of a" collective bargaining agreement. *Brotherhood of Ry. Carmen* v. *I.C.C.*, 880 F.2d 562, 574 (D.C. Cir. 1989). In exempting the carrying out of approved transactions from "the antitrust laws and from all other law," § 11341(a) does not "say that the ICC may also override contracts" (*id.* at 567); and "Congress focused nearly exclusively, in the hearings and debates . . ., on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract" (*id.* at 570).

The court below declined to consider whether that "immunity provision . . . may operate to override provisions of the RLA" (*id.* at 570), since, among other things, in "light of our holding that § 11341(a) does not

> empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA" (*id.* at 572). Thus, it remanded the cases to the ICC "to determine whether there is any live RLA issue remaining" (*id.* at 573); and, also, to reconsider its "theory that the labor protective conditions required by § 11347 of the Act are exclusive," and "its related assertion . . . that § 4 [Art. I] of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provision of a" collective bargaining agreement (*ibid.*).

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes most of the nation's major railroads (including petitioners) among its members. The NRLC represents members in multi-employer collective bargaining under the RLA and with respect to other labor relations issues of general concern to the railroad industry, including those arising in litigation before the courts.

As we shall show in our Argument, the Congress since 1920 has encouraged railroad consolidations to further the public interest in more economical and efficient rail service. Most of the major railroad systems are the product of past consolidations, some of which have yet to be fully consummated, and congressional policy continues to favor further such transactions. However, if the component parts, and their respective work forces, cannot in fact be consolidated insofar as inconsistent with a collective bargaining agreement, unless and until such agreement is changed in accordance with the RLA, a true consolidation will be impracticable if not impossible.

It is still generally true, as it was when *United States* v. *Lowden*, 308 U.S. 225 (1939), was decided, that the

seniority rights of railroad employees "are restricted in their operation to those members of groups who are employed at specific points or divisions." *Id.* at 233. An employee can neither exercise seniority to transfer to another seniority district nor be reassigned thereto by the carrier. If an employee voluntarily accepts employment in another seniority district, his seniority therein dates from that time so that he commences at the bottom of the seniority roster.[3]

The significance of this in a merger situation perhaps can best be illustrated by a hypothetical example. Assume that an operation on component A utilizing 50 employees is consolidated into a like operation on component B utilizing 100 employees, and that the consolidated operation requires 125 employees at the outset. If the seniority rules can be overridden, an implementing agreement or award determines how the 125 active employees from the 150-man combined workforce are selected and their seniority rights accommodated; the other 25 are furloughed, until recalled to work because of increasing business or attrition of more senior employees, and paid their guaranteed compensation for up to six years. If those rules cannot be overridden, it is unlikely that the 50 employees at A will accept an offer to work at B. If they remain at A, they will be entitled to guaranteed compensation for six years without working, and they would have bottom seniority if they move to B. In short, instead of working 125 experienced employees and paying a protective allowance to no more than 25, the carrier might have to hire 25 new employees to work with the 100 already employed at B and pay the protective allowance to all 50 that worked at A for up to six years.

Thus, if the seniority rules cannot be overridden, an actual consolidation could well mean that the carrier

[3] See, *e.g.*, *Seniority Practices—Railroad Operating Employees and Other Industries*, App. Vol. III to Report of the Presidential Railroad Commission (1962) at 227, 230-235.

for years would pay a significantly greater number of employees (many of whom would not be working) than if such consolidation is not effectuated, while utilizing a less experienced work force. Moreover, collective bargaining agreements often include scope rules or other provisions that the unions contend prevent a transfer of work from one component of the system to another. Such a contention was upheld by the arbitrator in the CSX proceedings involved in these cases, which could have barred the transfer of any work unless, as the arbitrator determined with the approval of the ICC, the implementing award overrides that limitation.[4]

If implementations of approved consolidations must be delayed until the unions agree in bargaining under the RLA, or the carriers have exhausted the "major dispute" procedures governing such bargaining, the unions could substantially delay and as a practical matter likely could prevent such implementations at any time. As this Court has observed, those procedures are notoriously "long and drawn out" and "almost interminable."[5] In

[4] In view of that ruling, the ICC did not reach the issue of whether the arbitrator's interpretation of the agreement was erroneous as the carrier contends. *See* 4 I.C.C.2d at 647, 649-650.

[5] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966); *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969). See, also, *Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429, 444 (1987) ("virtually endless"). The major dispute procedures are succinctly outlined, in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969), as follows: "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the service of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of

the NRLC's experience, they often require two or more years to exhaust. And if exhausted without an agreement, the unions can resort to primary strikes and to secondary picketing extending to the carriers nationwide.[6] Hence, the NRLC urges this Court to reverse the decision below. Otherwise, the efficiencies and economies that Congress anticipates from railroad consolidations seldom could be realized in fact.

SUMMARY OF ARGUMENT

In holding that the exemption from "all other law" is inapplicable to railroad collective bargaining agreements, without considering whether that exemption is applicable to the RLA, the Court of Appeals misconceived the relationships between such agreements and the RLA. The agreements are made and enforced under the RLA to which the plain terms of the exemption apply even if, as the court below erroneously concluded, it is not applicable to common-law obligations.

ARGUMENT

The Court of Appeals considered railroad collective bargaining agreements to be enforceable under the common law, and concluded that the exemption in § 11341(a) of the ICA from "all other law" does not extend to such common-law obligations. It held that the exemption does not provide a basis for overriding a labor agreement that would impede an implementation of a consolidation approved by the ICC under § 11343 without deciding whether that exemption may be applicable to the RLA.

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essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

[6] See, *e.g.*, *Burlington Northern* v. *Maintenance Employes, supra,* 481 U.S. at 450-453; *Railway Trainmen* v. *Terminal Co., supra,* 394 U.S. at 378-379, 384-385.

That approach reflects a radical misconception of the relationships between railroad labor agreements and the RLA. The holding that the § 11341(a) exemption is limited to statutory law is clearly erroneous in our opinion,[7] but that error essentially is irrelevant by reason of the Court's even more astonishing error in concluding that railroad labor agreements are enforceable under common law. Those agreements are bargained, construed and enforced under the RLA.[8] That is what the RLA is all about. But for the RLA, the railroads could terminate such agreements at will including any obligations thereunder that might impede implementation of a transaction approved by the ICC.[9] And, the RLA undoubtedly is a

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[7] The common law is "law" within any ordinary meaning of that term just as much as is statutory law. See, *e.g.*, *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 78-80 (1938). Moreover, it simply is not believable that the Congress intended, for example, to prevent statutes enacted by State legislatures from impeding the implementation of approved transactions but to permit State courts to achieve the same result through application of their common law doctrines. We note that, when enacted in 1920, the first predecessor of § 11341(a) also expressly applied to the antitrust laws. That was only nine years after the well-known decisions construing the Sherman Act as incorporating the "rule of reason" developed in the common law respecting unreasonable restraints of trade. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 50-62 (1911); *United States* v. *American Tobacco Co.,* 221 U.S. 106, 178-180 (1911). See *California* v. *American Stores Company,* 58 U.S.L.W. 4529, 4532-4533 (1990), regarding the controversy that arose out of those "most famous" decisions. Surely, the Congress did not intend to permit approved transactions to be subjected to common law rules of liability as unreasonable restraints of trade.

[8] Among many possible citations, even if limited to decisions by this Court, see, *e.g.*, *Andrews* v. *Louisville & Nashville R. Co.,* 406 U.S. 320 (1972); *Shore Line* v. *Transportation Union, supra,* 396 U.S. at 156; *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 722-728 (1945), on rehearing, 327 U.S. 661 (1946).

[9] "Another among the railroad industry practices which influenced the provisions of the Railway Labor Act was that of negotiating open-end collective bargaining agreements. Railroad agreements do not expire on a given date but remain in effect until one party or

"law" to which the § 11341(a) exemption on its face applies.

Thus, the issue of whether the § 11341(a) exemption affords a basis for obviating obstacles posed by labor agreements to a carrier's implementation of a transaction approved by the ICC is subsumed within the issue of whether that exemption applies to the RLA. The "paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms of an enactment of Congress. See *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 232." *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296-297 (1959). See also, *e.g.*, *California* v. *Taylor*, 353 U.S. 553, 561 (1957).[10] *Cf.*, *Schwabacher* v. *United States*,

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the other proposes modification of certain of the agreement's provisions, whereupon negotiations take place on the specific issues raised and, when agreement is reached, the contract is modified accordingly. The earliest railroad agreements known, dating back to the last quarter of the 19th Century, were of this open-ended type and the practice continues throughout the industry to the present time." Burgoon, *Mediation under the Railway Labor Act*, included in *The Railway Labor Act at Fifty* (GPO, 1977), at 71, 72. Under the common law, such open-ended agreements would be terminable at will by either party. See, *e.g.*, *Hodge* v. *Evans Financial Corp.*, 707 F.2d 1566, 1568 (D.C. Cir. 1983); *Martin* v. *Equitable Life Assur. Soc. of U.S.*, 553 F.2d 573, 574 (8th Cir. 1977); 17A C.J.S., Contracts, § 398, p. 478.

[10] The Court of Appeals previously had recognized that application of the § 11341(a) exemption to alleged rights under a collective bargaining agreement turned upon whether the exemption is applicable to the RLA. In *Brotherhood of Locomotive Engineers* v. *I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985), the ICC had relied upon that exemption in rejecting a union contention that the Commission's approval of a "consolidation . . . did not alter previous labor arrangements" between the unions and carrier parties to that transaction. 761 F.2d at 719. Although concluding that the exemption could apply to the RLA (and thus to alleged contractual rights under that statute) in appropriate circumstances (see 761 F.2d at 722-724), the Court of Appeals disagreed with the ICC's view that the exemption is self-executing and remanded the case for an explanation of why

334 U.S. 182, 199-202 (1948), where the Court held that the predecessor of § 11341(a) exempted the carrier parties to an approved transaction from contractual obligations enforceable under State law inconsistent with implementation of that transaction.

The exemption from "all other law" hardly could be phrased more broadly and there can be no doubt that the RLA on its face is an "other law." As this Court once again reiterated in *Kaiser Aluminum & Chemical Corporation* v. *Bonjorno*, 58 U.S.L.W. 4421, 4423 (1990):

> "The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' "

The Congress has not expressed an intent to exclude the RLA from the scope of the exemption plainly expressed in § 11341(a). Hence, as the lower courts consistently have recognized, that exemption is applicable in appropriate circumstances to the RLA.[11] Hence, it also is ap-

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application of the exemption so as to terminate the unions' "asserted right to participate in crew selection is necessary . . . ." 761 F.2d at 725; generally, at 724-725). This Court reversed essentially on the ground that the unions had not raised their contentions before the ICC in a timely manner. *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987). In a concurring opinion by Justice Stevens, four members of the Court agreed with the "ICC's argument that § 11341 is self-executing and that the Commission need not make any explicit necessity findings" (482 U.S. at 297), and thus would have reversed the Court of Appeals for that reason.

[11] In addition to the case discussed in n.10 above, see, *e.g.*, *Broth. of Loco. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1986); *Missouri Pacific R. Co.* v. *United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987); *Burlington Northern, Inc.* v. *American Ry. Super. Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-280 (6th Cir. 1972); *Nemitz* v. *Norfolk and Western Railway Co.*, 436 F.2d 841, 845 (6th Cir. 1971); *aff'd*, 404 U.S. 37

plicable to collective bargaining agreements enforceable under the RLA insofar as they would impede the carrying out of a transaction approved by the ICC. The court of appeals erred in holding to the contrary.[12]

(1971); *Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963); *Texas & N.O. Ry.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151, 161-162 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Ry. Labor Executives* v. *Guilford Transp. Indus.*, 667 F. Supp. 29, 35 (D. Me. 1987), *aff'd* (table), 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 57 U.S.L.W. 3839 (1989).

[12] Assuming that it otherwise is applicable, the exemption from "all other law" applies insofar "as necessary to let" a participant in a transaction approved by the ICC "carry out the transaction . . . ." Thus, that "as necessary" requirement is not applicable to the transaction itself, but to the carrying out of the transaction in a manner that comes within the scope of the ICC's approval. See *ICC* v. *Locomotive Engineers*, *supra*, 482 U.S. at 298 (concurring opinion). Since the ICC held that the implementations proposed by the carriers in these cases do come within the scope of its approvals, and authorized certain transfers of work and employees in connection therewith, the only issue under the "as necessary" requirement is whether the RLA or agreements thereunder would impede the carriers from carrying out those rulings by the ICC if not exempted under § 11341(a). If the carriers otherwise would have to comply with requirements of the RLA before transferring such work or employees, then the exemption is "necessary" and is applicable to relieve the carriers of such requirements and from any inconsistent provisions of agreements under the RLA.

CONCLUSION

The decision by the Court of Appeals should be reversed.

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